No. 22516

**In the**

# United States Court of Appeals

***For the Ninth Circuit***

---

WILLIAM A. PORTER

*Appellant,*

*vs.*

W. FRANCIS WILSON AND PAULINE WILSON, Husband and Wife, and RICHARD A. WILSON AND SHARON L. WILSON, Husband and Wife,

*Appellees.*

---

Upon Appeal from the District Court of the United States for the District of Arizona

## APPELLEE'S BRIEF

---

RICHARD A. WILSON
LUTICH, D'ANGELO & WILSON
3120 North Third Avenue
Phoenix, Arizona 85013

*Attorneys for Appellees*

*SUBJECT INDEX*

*INDEX TO AUTHORITIES*

*INDEX TO AUTHORITIES (continued)*

No. 22516

**In the**

# United States Court of Appeals

***For the Ninth Circuit***

---

WILLIAM A. PORTER

*Appellant,*

*vs.*

W. FRANCIS WILSON AND PAULINE WILSON, Husband and Wife, and RICHARD A. WILSON AND SHARON L. WILSON, Husband and Wife,

*Appellees.*

---

Upon Appeal from the District Court of the United States for the District of Arizona

## APPELLEE'S BRIEF

---

RICHARD A. WILSON
LUTICH, D'ANGELO & WILSON
3120 North Third Avenue
Phoenix, Arizona 85013

*Attorneys for Appellees*

## *BRIEF OF APPELLEES*
## *STATEMENT OF THE CASE*

The Statement of the case, as set forth by Appellant is to a large degree not pertinent to the present action.

The necessary facts are:

In 1959, a separate maintenance action was begun in the Superior Court of Arizona, in and for the County of Maricopa. Plaintiff was Gladys E. Porter. Defendant was William Arnold Porter. The Defendant failed to answer. In August, 1959, Gladys E. Porter, by Sheriff's Deed, acquired title to the real property here in question known as the Arizona Hotel. In May, 1960, Gladys E. Porter quit-claimed one-half of the property to Appellees, W. Francis Wilson and Richard A. Wilson. A full discussion of the facts of Porter v. Porter is set forth in the following cases, and it would serve no purpose to re-iterate them here should the Court determine they are pertinent:

*Kemble v. Stanford*, 86 Ariz. 392, 347 P.2d 28;

*Porter v. Stanford*, 86 Ariz. 402, 347 P.2d 35, cert. den. 371 U.S. 829, 83 S. Ct. 23, 9 L.Ed. 2d 66;

*Kemble v. Porter*, 88 Ariz. 417, 357 P 2d 155; and

*Porter v. Porter*, 1 Ariz. App. 363, 403 P2d 298, 101 Ariz. 131, 416 P2d 564, cert. den. 386 U.S. 957. 87 S. Ct. 1028, 18 L. Ed. 2d 107.

In 1961, the instant action was commenced by Continental Hotels System, an alleged co-partnership against Appellees. All parties, by Stipulation filed September 11, 1964, agreed that the outcome of the instant case would be determined or controlled by the final decision in *Porter v. Porter*, supra, (Tr 103). After the opinion in *Porter v. Porter*, supra, the Appellees moved for Summary Judgment, or in the alternative, to Dismiss (Tr 78). The matter was set for the 22nd day of May, 1967 (T.R. 103) and then continued pursuant to stipulation to the 12th day of June, 1967 (T.R. 103), at which time Mr. Paul Beer was present for Plaintiffs (T.R. 103), and at which time the lower Court

heard the matter and granted Defendants' Motion to Dismiss (T.R. 103).

Thereafter, on June 13, 1967, Plaintiff's Motion for Continuance of the hearing on Defendants' Motion was filed (T.R. 83 and 104).

Thereafter, motions were made and appropriate judgment and orders entered, as reflected by the record, and this appeal followed.

## *THE MATTERS PRESENTED BY THIS APPEAL ARE MOOT, AND THE APPEAL SHOULD BE DISMISSED.*

As noted in Appellant's brief and by letter dated November 2, 1963 (Tr. 99), the subject property has been sold by Appellees, along with GLADYS E. PORTER, to the City of Phoenix, and Appellees make no further claim to the property.

Since the Complaint herein seeks to have it determined that Appellees have no interest in the property, it would seem the issues are moot, and no purpose would be served by proceeding with this appeal.

Accordingly, Appellees respectfully move the Court to dismiss the appeal.

## *APPELLANT IS NOT A PROPER PARTY TO THIS APPEAL*

The Appellant makes no representation to the Court that he brings this Appeal on behalf of the alleged partnership which was the plaintiff below.

The Motion for New Trial (T.R. 89-90), refers only to the rights of William A. Porter, and in paragraph III thereof refers to "the title of Plaintiff, William A. Porter," and again in paragraphs IV and V reference is made to the rights of William A. Porter. No mention is made of the alleged partnership which was the plaintiff.

Arizona is governed by the provisions of the *Uniform Partnership Act. Chapter 2, Title 29, Arizona Revised Statutes.*

The original theory of this action was that the subject property belonged to a partnership composed of these persons. *Sec. 29-225, A.R.S. 1956,* sets forth the rights of a partner in specific partnership property:

"Sec. 29-225. Nature of a partner's right in specific partnership property

A. A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

B. The incidents of this tenancy are such that:

1. A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

2. A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

3. A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

4. On the death of a partner his right in specific partnership property vests in the surviving partner or partners except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

5. A partner's right in specific partnership property is not subject to dower, courtesy, or allowances to widows, heirs, or next of kin."

Under this statute, William A. Porter has no individual right in this property, and since no representation is made that he

brings this appeal on behalf of the alleged partnership as a partner, the partnership must be deemed to have accepted the judgment of the lower court and he is not properly before this court and the appeal should be dismissed.

*REPLY TO POINT OF ERROR I*

The statement made on Page 8 of Appellant's brief referring to Plaintiff's Motion for Continuance.

"The motion was denied and the hearing held anyway . . ."

is pure fabrication.

The facts as shown by the record are as follows:

Defendants' Motion for Summary Judgment, or in the alternative to dismiss, was originally set for May 22, 1967, at the suggestion of Plaintiff's counsel; by stipulation, the matter was continued to June 12, 1967.

The hearing was had on June 12, 1967, at which time Mr. Paul Beer appeared for the Plaintiffs, argument was had, and Defendants' Motion was granted. (Tr. 103)

Plaintiff's motion for continuance was not received by the Clerk of the lower court until June 13, 1967, as reflected by the Clerk's stamp on the rupper right-hand corner thereof (Tr. 83), and was docketed the same day (Tr. 104). The Motion was, in fact, never ruled upon because it was moot. To claim that denial of a motion (which did not occur) by a trial judge is prejudicial when the same is not filed until the next day, is irresponsibility of the highest order.

There can be no question that even had the motion been denied under the facts, it could not have constituted an abuse of discretion.

REPLY TO POINTS OF ERROR II and III

*APPELLANT HAS ABANDONED AND WAIVED HIS CLAIM UNDER THE IDAHO JUDGMENT*

As noted heretofore, the complaint in this matter is one which lies in quiet title (T.R. 1-3).

The Appellant in his brief is apparently relying on Plaintiffs' Motion for Summary Judgment as his basis for attempting to raise the question of full faith and credit at this time. The Minute Entires of the Trial Court (T.R. 103 and 104) show that although the *Plaintiffs'* Motion for Summary Judgment was filed on the 8th day of November, 1965, it was never set for hearing, and that the only matter brought before the court was *Defendants'* Motion for Summary Judgment, or in the alternative, to dismiss (A & E 499 [1]).

Although this point is so basic that there seems to be little need for authority, and indeed little authority exists, what authority there is is to the effect that:

> "A motion may be waived or abandoned by failure to proceed with respect to it, or by proceeding before the determination of the motion in a manner inconsistent with the object of the motion (60 C.J.S. 42, Motions, sec. 42; *Brandes v. Illinois Protestant Children's Home, Inc.*, 179 N.E. 2d 425; *Harju v. Anderson*, 111 Or. 414, 225 Pac. 1100.

Further, the matter may not be considered on review, the Court in *Stinson v. Business Men's Accident Ass'n*, 43 F. 2d 312, set forth the applicable law when it said, at page 314,

> "It is a question of law, however, whether a judgment is sustained by any substantial evidence, but in order to present that question on appeal it must appear from the record that a request or motion was made, denied and excepted to, or some other like step was taken, which fairly presented that question to the trial court and secured its ruling thereon before the close of trial," (omitting authorities), See also *Brandes v. Illinois Protestant Children's Home, Inc.*, supra.

For these reasons there can have been no error committed by the trial court under either Point of Error II or III, since the matter was not presented.

## *FULL FAITH AND CREDIT NOT AN ISSUE*

It appears from the pleadings filed by Appellant in this cause, and by Appellant's opening brief, that the position of Appellant has moved drastically from that of a simple quiet title action to that of an intricate---if obvious---attempt to relitigate the matters already fully litigated in the case of *Porter v. Porter,* 1966, 101 Ariz. 131, 416 P. 2d 564. As a matter of fact, Appellant's entire brief is strikingly similar to the dissenting opinion rendered in the Porter case.

The entire emphasis of the brief, both in approach and in citation of authorities, disregarding the first assignment of error, is directed toward the question of whether the trial court committed error in denying full faith and credit to a Decree of Divorce rendered in the State of Idaho. This question has been fully litigated by the Arizona State Courts, as appears from the citations set forth in Appellees' Statement of Facts. More important, the matter has been fully litigated by the Supreme Court of the United States. After the Arizona Supreme Court decision in *Porter v. Porter,* (supra), Appellant herein filed a Petition for Writ of Certiorari on the precise Federal question raised by Appellant in its brief in this case, to-wit: denial of full faith and credit by the Arizona Court to the Idaho divorce judgment, and on March 13, 1967, the United States Supreme Court denied certiorari *(386 U.S. 957, 87 S.Ct. 1028, 18 L.Ed. 107).*

To trace the effect of the denial of the Writ of Certiorari by the United States Supreme Court upon the right of Appellant to entertain the instant action, we must first look at *Rule 19 of the Revised Rules of the Supreme Court of the United States* (formerly Rule 38, and before that Rule 35), which we quote in part below:

"Rule 19. Considerations governing review on certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court as decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court . . ."

In the case of *Campbell River Mills Co. v. Chicago, M., St. P. and P. R. Co.*, D.C. Wash., 42 P.2d 775, the Plaintiff had sought and received an adjudication by the Department of Public Works in Washington that Plaintiff had been required by Defendant railway company to pay an excessive tariff rate. The Department found in favor of plaintiff, and through successive appeals brought by Defendant the judgment for plaintiff was affirmed by the highest court of the State of Washington. Thereupon, the defendant presented a petition for writ of certiorari to the United States Supreme Court, denying the jurisdiction of the Department of Public Works over the subject matter of the litigation as the federal question involved. Certiorari was denied. Thereafter, the Department of Public Works computed the overcharge, and when defendant did not pay, Plaintiff instituted an action in the State court thereon. Defendant removed the action to federal court, and after judgment was rendered against him, appealed, once more raising the question of lack of jurisdiction over the subject matter. In this connection, and in considering the effect of the denial of the Writ of Certiorari by the United States Supreme Court, the Appellate Court stated at Page 778:

"(8) While denial of certiorari is not viewed in the light final judgment upon the issue, it is the instant case most persuasive. While the granting or refusal of the petition for the writ adds or withholds no sanction to the decision, rule 38 (former rule 35) of the Revised Rules of the Supreme Court (28 USCA Sec. 354) says a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be

granted only where there are especially important reasons therefor, such as *where a state court has decided a federal question not determined by the Supreme Court, or probably not in accord with the decisions of that court,* (emphasis supplied) or where there is a conflict of decisions of the same matter in the Courts of Appeals in the different circuits, or the Circuit Court has decided an important question of local law probably in conflict with legal decisions or the weight of authority, or a question of law which should be settled by the Supreme Court, or a federal question in conflict with applicable decisions of the Supreme Court, or departed from the usual course of judicial proceeding as to call for the exercise of the supervisory power. It is apparent that the federal question involved was before the Supreme Court upon the petition for writ, and the rule of court and the denial of the writ would appear to be conclusive. See discussion, 'certiorari denied,' *Stamey v. U.S.* (D.C.) 37 F. (2d) 188."

In the instant case, it is likewise apparent that the Federal question raised by Appellant in this appeal has been previously considered by the U.S. Supreme Court upon the petition for the writ of certiorari. Having received unfavorable results, Appellant now seeks to attack the Arizona judgment by these collateral proceedings.

The question presented in this appeal is not properly a question revolving around full faith and credit or the "concept of federalism", as stated by counsel for Appellant, but rather a question of the proper application of the doctrine of res adjudicata. Once again, quoting from the *Campbell* case, supra:

"The foundation of the doctrine of res judicata, or estoppel by judgment, is that both parties have had their day in court. *2 Black, Judgts. Secs. 500, 504.* The general principal was clearly expressed by Mr. Justice Harlan, speaking for this court in *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48, 18 S. Ct. 18. 27, 42 L.Ed. 355, 'that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.' *United States v. Sakharam Ganesh Pandit* (C. C. A.) 15 F. (2d) 285, 286."

It is, therefore, Appellees' position that it is unnecessary to respond to the propositions of law presented by Appellant in his brief as relates to full faith and credit. In any event, these legal theories are no more than a reiteration of the dissenting opinion of Judge Udall in the *Porter v. Porter* case, supra, and the majority opinion in that case provides all rebuttal necessary to Appellant's position. Should this Honorable Court feel the question of full faith and credit raised by Appellant to be in fact a matter for this Court's consideration, which we submit it is not, the majority opinion in the Porter case (101 Ariz. 131, 416 P.2d 564) more clearly and succinctly states Appellees' position than counsel could hope to do.

This matter has been determined by the highest court of the State of Arizona and by the United States Supreme Court and is res adjudicata as to this Appellant and to Appellees who stand in privity to Gladys E. Porter.

We submit that the trial court was correct in its order denying the motion for new trial and the authorities citied therein.

This case comes squarely under the authority of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, in which the Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State shall be declared by its Legislature in a Statute or by its highest court in a decision is not a matter of federal concern . . ."

We submit, the issue of full faith and credit no longer exists and the issues raised by Appellant have been fully litigated and are now res adjudicata. We shall respond to this issue no further.

*CONCLUSION*

For the reasons stated above, the Appellant's appeal should be dismissed, or, in the alternative, the judgment of the lower court affirmed, there being nothing before this Court upon which the judgment should be reversed, nor upon which judgment could be granted for Appellant.

Respectfully submitted,

LUTICH, D'ANGELO & WILSON

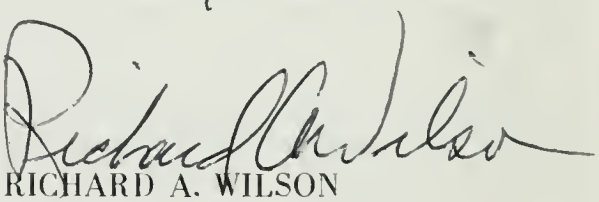
By: 

RICHARD A. WILSON

*CERTIFICATE*

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated at Phoenix, Arizona, this 4th day of April 1968.



RICHARD A. WILSON